FOR ARGUMENT

Supreme Court, U.S.
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In the Supreme Court of the United States

January Term, 1979
No. 78-1318

HELEN B. O'BANNON, SECRETARY OF PUBLIC WELFARE,
Petitioner

vs.

TOWN COURT NURSING CENTER, et al.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I.

THIS COURT SHOULD GIVE PLENARY REVIEW TO THE QUESTION PRESENTED

1. Respondents[1] have argued that this Court may not review the question which has been presented in the certiorari petition because the petitioner's predecessor did not appeal from that portion of the District Court's order which was adverse to his interests.[2] Alternatively they contend that, even if petitioner has standing to seek review, the arguments which are being advanced by petitioner and H.E.W. urging reversal were not preserved in the lower court.

The first contention, that petitioner lacks standing to seek review of the Court of Appeals' ruling, fails to recognize that having succeeded in the District Court on the issue of primary importance—the scope of the respondents' due process rights—petitioner was therefore an appellee before the Court of Appeals. And as a proper

[1] Although the United States is technically a respondent before this Court, we refer only to the patients of Town Court as "respondents" in this brief.

[2] In addition to ruling in Petitioner's favor with respect to respondents' request for a preliminary injunction, the District Court ordered that "the defendants shall not withhold payments for services actually provided to patients" (A. 117a). It was this funding order from which only the United States appealed.

party before the Court of Appeals, she is now entitled to seek review of the Court of Appeals' adverse ruling in this Court. It is of little consequence that the favorable district court ruling was defended by H.E.W. rather than petitioner's predecessor.[3] Moreover, this Court's certiorari jurisdiction is very broad and extends to the "petition of any party" 28 U.F.C. §1254 (1); see *Stern & Gressman*, Supreme Court Practice, 433-34 (5th ed. 1978) (which suggests that even a successful party below may properly seek and be granted plenary review in this Court). In short, as a proper party before the Court of Appeals suffering an adverse ruling in that Court, petitioner now has standing to seek review of that ruling here.

2. While it is true that petitioner's predecessor did take the position that he had no interest in the proceedings before the lower court, under these circumstances, the arguments now being advanced by petitioner should be reviewed by this Court. As the Solicitor General has noted, the arguments which are raised in this Court urging reversal, were asserted in the Court of Appeals in defense of the District Court's order. And since the lower court decided the question favorably to respondents, there simply is no reason why petitioner may not now present the question for review here. In addition, it is important to note that H.E.W. is making the same arguments as petitioner and is clearly a proper party here.[4] Thus, because she has standing in this Court, and is raising matters presented to and decided by the Court of Appeals, and because H.E.W. can unquestionably raise the same questions here, this Court should give plenary review to the question and arguments presented by petitioner.

[3] The Solicitor General is correct in noting that the Petitioner's predecessor was not required to file a surplus notice of appeal, when H.E.W., with identical interests, had done so. U.S. Br. at 19.

[4] See U.S. Br. at 19, n. 28.

II.

IF PROPERLY RAISED, RESPONDENTS' CLAIMS UNDER STATE LAW AND ASSERTION OF "LIBERTY" INTEREST IN THE TERMINATION OF TOWN COURT LACK MERIT

1. Respondents have offered two new theories in support of their claim to the protections of the Due Process Clause in this case. First they assert rights as third party beneficiaries to the provider agreement between Pennsylvania and Town Court. Resp. Br. 26-30. And, alternatively, they argue that their liberty interests in freedom of association and life is infringed by the termination of Town Court as a Medicaid provider. Id. at 35-40. However neither of these arguments was presented to the lower court, or for that matter to the District Court, and they should not be considered here. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970).

Nevertheless, these claims fail on their merits. For example, it is true that, under Pennsylvania law, contractual rights can vest in non-parties to a contract who are intended to benefit from the agreement. It is also correct that if these interests exist they would ordinarily be protectable under the Due Process Clause. However, it is settled Pennsylvania law that a third party beneficiary has no greater rights than are expressed in the contract.

Williams v. Paxson Coal Co., 346 Pa. 468, 31 A.2d 69 (1943); *Ziminsky v. Ziminsky*, 210 Pa. Superior Ct. 266, 231 A.2d 904 (1967). Here the contract between Town Court and Pennsylvania expressly provided that "failure by the nursing home to comply with laws or regulations shall entitle the Department to terminate the agreement forthwith".[6] Thus, even if this contention had been properly asserted, it provides no basis for the decision of the Court of Appeals.

2. Similarly, even if the Court chooses to address the "liberty" interest argument, in our view, it lacks substance. The theory that any government action which adversely affects a particular individual gives rise to a protectable liberty interest under the Due Process Clause has been expressly rejected by this Court. In *Meachum v. Fano*, 427 U.S. 215, 224 (1976), it was noted that, "[w]e reject at the outset the notion that *any* grievous loss visited upon a person by the state is sufficient to invoke the procedural protections of the Due Process Clause." See also *Ingraham v. Wright*, 430 U.S. 651 (1977).

Here, the government action complained of, withdrawal of medicaid funding from the Town Court nursing home, undoubtedly will have some impact upon respondents as residents of this home but this is sufficient to trigger the protection of the Due Process Clause. Thus, the argument that the increased risks to respondents which may indirectly result from the termination of Town Court

[6] A form of a typical nursing home provider agreement can be found in Department of Public Welfare—Office of Medical Programs—Medical Assistance Manual §9427 Appendix VIII (January 1, 1973) (copy attached to this Brief as an appendix).

as a Title XIX provider, whatever its factual merit,[7] simply misses the mark. The state has terminated a contractual relationship with a Medicaid provider and, absent a provision in the statute giving the respondents some role in this decision, there is no basis for imposing the restrictions of the Due Process Clause on the government.

Respectfully submitted,

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[7] It is important to note that the Court of Appeals expressly refused to predicate its decision in any way on these contentions. *Klein v. Califano*, 586 F.2d 250, 259-60, n. 16 (3d Cir. 1978).

APPENDIX

MEDICAL ASSISTANCE (MA)—
SKILLED NURSING FACILITY CARE AND SERVICES
COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
MEDICAL ASSISTANCE PROGRAM
SKILLED NURSING HOME CARE AGREEMENT
9424 APPENDIX VIII

This AGREEMENT entered into ——— by and between the office of Medical Programs of the Department of Public Welfare, hereinafter referred to as the "Department" and the

Nursing Home, as the provider of service, hereinafter referred to as the Nursing Home."

WITNESSETH:

WHEREAS, the Public Welfare Code, Act 21 of June 13, 1967, P.L. 31, Article IV, provides for skilled nursing home care in private, public, or non-profit facilities, and

WHEREAS, Chapter II of Rules and Regulations of the Social and Rehabilitation Service, Department of Health, Education and Welfare on Standards for Payment for Skilled Nursing Home Care, Part 249.33 (a) (2) require an Agreement between the Department and a facility to provide skilled nursing home care and receive payments under the Medical Assistance Program.

Now, THEREFORE, the parties mutually agree as follows:

A. *Nursing Home Responsibilities*

The Nursing Home agrees to fulfill or meet the following requirements as a basis for participation in the Department's Programs:

1. Meet Federal and State Standards and Requirements for Skilled Nursing Home Operation and Care and be certified to participate as a provider of extended care under Title XVIII or be approved and licensed by the Department to operate a Skilled Nursing Home. Out-of-State nursing homes are approved by the licensing or supervising authority of that state.

2. Provide Department's patients with facilities, care services and treatment suitable to their illness and of comparable quality with care provided to persons in other circumstances and without regard to the source of the payment for their care.

3. Agree that in the performance of this Agreement that there will be no discrimination against any employe or other person, on account of race, color, sex, ancestry, age, or national origin, and that the Commonwealth upon receipt of evidence of such discrimination shall have the right to cancel this Agreement. The Nursing Home agrees to comply with the requirements of Title VI of the Civil Rights Act of 1964.

4. Will have a Nursing Home Administrator licensed by State Board of Examiners of Nursing Home Administrators.

5. Promptly notify the appropriate County Assistance Office of the Department of any known change

in a Department's patient income, eligibility, or living status.

6. Have a written Transfer Agreement with one or more general hospitals with effective arrangements for the transfer of patients and/or prompt availability of diagnostic and other out-patient services as may be requested by the attending physician.

7. Maintain complete and accurate records for Department's patient as set forth in the Rules and Regulations pertaining to Nursing Homes; permit the Department or its agents to have free access to medical records and to furnish information or provide copies of medical records upon request. Records will be maintained a minimum of seven years.

8. Assure that each of the Department's patients have a complete medical evaluation on admission and annually, and a current plan of care which includes physician, nursing and social services for rehabilitation and treatment.

9. Undergo at least an annual, on-site evaluation by a Medical Review Team of the Department to determine whether quality, quantity and level of care requirements are being met by the Nursing Home. Upon written notification by the Department of deficiencies and/or alternative care planning, the Nursing Home will take corrective action within a period not to exceed six months. Failure to correct deficiencies will be a cause for the Department to terminate the agreement, payments, and participation by the Nursing Home in the Department's Programs.

10. File a Utilization Review Plan for approval by the Department and establish an internal Utilization Review Program and Committee of services and facilities of the Nursing Home and a sample of patient records or cases currently receiving care and cases discharged. Physicians having an ownership interest in the Nursing Home may not serve on the Nursing Home's Utilization Review Committee. The Nursing Home will file with the Department a quarterly statistical report of all cases with a subtotal of Medical Assistance Cases reviewed and disposed of by the Nursing Home Utilization Review Committee.

11. Furnish to the Department full and complete information as to the identity: (a) of each person having, directly or indirectly, an ownership interest of 10 percent or more in the Nursing Home; (b) in case the Nursing Home is organized as a corporation; ownership interest of each officer and director of the corporation; and (c) in case the Nursing Home is organized as a partnership, ownership interest of each partner. Changes in ownership will be promptly reported to the Department and a new agreement must be executed between the Nursing Home and the Department.

12. Plan in cooperation with the County Assistance Offices of the Department to assure the timely transfer to lesser levels of care within 60 days or the timely discharge of Department's patients no longer requiring Nursing Home Care.

13. The Nursing Home will charge the Department or its recipients according to the Department's Regulations for Public or Private Skilled Nursing Care.

14. For payments on behalf of Medical Assistance patients in Public Nursing Homes, submit invoices monthly to the County Assistance Office, on forms provided by the Department and certify that information contained in

original or copies of records and invoices submitted is true, accurate, and complete.

15. Recognize that payment and satisfaction of claims will be from Federal and State funds, and that any false claim, statement of documents or concealment of material fact may be cause for prosecution under applicable Federal or State laws.

16. File quarterly statements with the Department on the average daily census and number and types of personnel on each shift during a week of a quarterly period.

17. Public Nursing Homes will file required fiscal reports with the State Auditor General within 90 days after the end of each calendar year or within 90 days after receipt of the forms and instructions, whichever is later. Failure to file a report before March 31, unless an extension of time is granted by the Auditor General, will result in termination of payments and participation upon written notice of the Department.

18. The Nursing Home agrees to abide by the Department's Regulations and all other applicable State and Federal laws and regulations in existence at the effective date of the agreement and as they may be changed from time to time after proper notice of contemplated changes are issued in accordance with existing policies and procedures. Failure by the Nursing Home to comply with laws or regulations shall entitle the Department to terminate the Agreement forthwith. Any new or revised State and Federal Regulations and Laws adopted, which affect this Agreement or the Nursing Home's performance hereunder, constitute an option on the part of the Nursing Home to terminate this Agreement within 30 days if such changes are not acceptable to the Nursing Home.

B. *Department's Responsibilities*

The Department will carry out the following responsibilities:

1. Inspect, certify, and approve Nursing Facilities for participation in the Department's Programs under Title XIX of the Social Security Act.

2. Notify Nursing Facilities in writing of any deficiencies in operation or level of patient care.

3. Determine eligibility of Medical Assistance patients for Nursing Home Care through the Department's County Assistance Offices and notify the Nursing Home.

4. Make payments and any payment adjustments to the Nursing Home according to the Department's Regulations.

5. Assist the home to place or transfer patients to other facilities if the Agreement is cancelled by either party.

C. *General Provisions*

1. This Agreement may be terminated by either party upon 30 days advance written notice. (Either party has the right of appeal within 30 days after receipt of a written notice terminating the agreement).

2. In the event the Agreement is terminated, the obligation of the Department to make payments to the Nursing Home for prior services shall be in accordance with the Department's Regulations governing payments for Nursing Home Care.

3. This Agreement, when approved by the Department, is effective on ———————— and will extend

until _____. The Agreement will then be considered for renewal in writing for one additional six months period or subsequent one year periods providing the standards and requirements are being met.

IN WITNESS WHEREOF, the parties have caused this Agreement to be executed by their officials thereunto duly authorized.

NURSING HOME	DEPARTMENT OF PUBLIC WELFARE
Name	Name
Title	Title
Date	Date

DPW-OMP-MA Manual
MSF-54

Effective September 11, 1975